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No. 988

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE ELGIN CORPORATION,

Petitioner,

vs.

THE ATLAS BUILDING PRODUCTS CO., a corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The respondent has no objection to the portions of the Petition entitled "Opinion Below", "Jurisdiction" and "Statute and Rule Involved" (Pet., pp. 2, 3). The respondent is dissatisfied with the petitioner's "Questions Presented" and Statement of the Case".

QUESTIONS PRESENTED

The sole question presented by this Petition for Writ of Certiorari is whether this Court will review a case in which the Court of Appeals affirmed a jury verdict in favor of the respondent, where no evidence taken at the trial of the case is contained in the record on appeal, and where the only error on the part of the trial court claimed before this Court relates to the giving of certain instructions by the trial court and the refusal by the trial court to give certain of the requested instructions of the petitioner.

STATEMENT OF THE CASE

Respondent's major objection to petitioner's Statement of the Case is that it purports to give a statement of facts by the assertion that certain facts were admitted by the pleadings or were contained in respondent's Answers to Interrogatories (Pet. 5). This simply is not true as there were *no* evidentiary facts before the Court of Appeals and there are *no* evidentiary facts before this Court. The petitioner, for reasons of its own, and over the strong protest of respondent, chose to take this appeal with no evidence in the record and hence no facts. Having made this choice and having obtained over the objection of respondent an order from the Court of Appeals allowing diminution of the record, petioner is in no position to object that this Court is being called upon to decide whether to grant certiorari in the vacuum created by the absence of facts. It is not correct to state that allegations in pleadings constitute facts. Pleadings make issues but are not introduced in evidence before the Jury, and aside from making issues serve no additional purpose. Petitioner's attempt to use the Answers to Interrogatories as "facts" constitutes a violation of the Order of

the Court of Appeals which allowed a diminution of the record, since as to such Answers this order reads: " . . . . the same shall be included in the record on appeal, but only for the purpose of enabling this Court to review the action of the District Court in denying the plaintiff's Amended Motion to Strike which is stated as the first Point of Appellant's First Amended Statement of Points." (R. 4).

Petitioner's attempt on pages 5 and 6 of its Petition for Writ of Certiorari to use such Answers as the "facts" in the case is therefore completely unjustified. The actual facts in the case were extremely favorable to the respondent, which may be the reason the petitioner wished to take this appeal without the facts.

The only fair statement of this case would be as follows:

1) Petitioner on January 4, 1956, filed suit for treble damages and an injunction, pleading alleged violations by respondent of 15 U.S.C.A., Sec. 13(a), which alleged violations had damaged petitioner (R. 6-9).

)2 Respondent by answer denied any violation of 15 U.S.C.A., Sec. 13(a), denied any damages and set up the affirmative defenses of the Statute of Limitations and of the good faith meeting of the equally low price of a competitor (R. 15-17, S.R. 5-8).

3) Petitioner moved to strike the defense of the good faith meeting of the equally low price of a competitor (R. 81-83) and the Court denied this motion (R. 83).

4) The case was tried before a jury, which after being instructed by the Court, returned a general verdict in favor of respondent (R. 106). Judgment was entered in favor of respondent and the request for an injunction was denied (R. 106).

5) Petitioner made a timely appeal from this judgment (R. 107, 112).

It is on the above skeleton that the petitoner has chosen to bring this appeal before the Circuit Court of Appeals and to bring this Petition for Writ of Certiorari to this Court.

ARGUMENT

PONIT I. IN THE ABSENCE OF ANY EVIDENCE IN THE RECORD, THIS COURT CANNOT POSSIBLY DETERMINE WHETHER THERE ARE ANY QUESTIONS OF MAJOR PUBLIC IMPORTANCE RAISED IN THIS CASE.

It is well settled that this Court will not grant Certiorari in order to argue legal principles in a vacuum. As so aptly stated by Mr. Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74, 99 L. Ed. 897, 901 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

In the instant case, if the Court did grant certiorari it could do nothing more than discuss certain nebulous legal doctrines surrounding the Clayton Act and the Robinson-Patman Act, since there is a complete absence of any facts on which to ground such discussion. Petitioner appar-

ently claims that these issues under the Clayton Act and Robinson-Patman Act are raised by certain of the Court's Instructions and by certain of petitioner's Requested Instructions, which were not granted by the Court. Without any evidence in the record, however, instructions given or refused simply raise abstract propositions of law. As stated by this Court in *Jones v. Buckell,* 104 U. S. 554, 556, 26 L. Ed. 841, 842 (1882):

> "But with no issue made directly by the pleadings, and no evidence set forth or referred to in the bill of exceptions showing the materiality of the charge complained of, the case presents to us only an abstract proposition of law which may or may not have been stated by the court in a way to be injurious to the plaintiffs in error."

Mr. Chief Justice Waite summed up this rule of law succinctly in *New York, Lake Erie and Western R. R. Co. v. Madison,* 123 U. S. 524, 526, 31 L. Ed. 258, 260 (1887) as follows:

> "No part of the evidence, save that which was excepted to, is set out in the bill of exceptions, and there is no such statement of the facts proven as will enable us to see that the charge as given or refused had any reference to the case as it appeared at the trial. The record as it comes to us presents only abstract questions of law, which may or may not have been ruled in a way to affect the defendant injuriously. It has long been settled that such questions will not be considered here on a writ of error unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried."

See also *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183, 193-196, 30 L. Ed. 644, 647-649 (1887). It is also well settled in this Court that in the absence of a record containing an affirmative showing of error, it will be presumed that the judgment of the trial court is correct; *Coffee v. Planters Bank*, 54 U. S. 183, 14 L. Ed. 105 (1851); *Boley v. Griswold*, 87 U. S. 486, 22 L. Ed. 375 (1874); *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110 (1879); and where there is no evidence in the record, it will be presumed that the evidence supports the verdict and the judgment. *Mays v. Fritton*, 87 U. S. 414, 22 L. Ed. 389 (1874). From the fact that all of the above-cited cases were decided before 1900 and from the fact that there have been no similar cases since that date, it is apparent that before the turn of the century this Court took cases with an insufficient record and summarily affirmed, while since the turn of the century this Court has simply refused to consider cases with an insufficient record.

Two final general doctrines of law cement the futility of this petition. In the first place, this Court has made it clear in discussing requested instructions that the entire requested charge must be correct, or else the Trial Court is justified in refusing to give the charge. The Court has no duty to do anything more than pass upon the request in its entirety. *Worthington v. Mason*, 101 U. S. 149, 25 L. Ed. 848 (1880). Since a requested instruction is not correct if it does not have any foundation in the facts of the case, obviously the validity of requested instructions cannot be passed upon in the absence of the evidence. A perfect illustration of this obvious rule is shown by petitioner's requested instruction No. 5 (R. 83-84), the first paragraph of which brings out the issue of the lawfulness of the price which the seller is meeting in good faith. The trial judge, Judge Hatch, made a handwritten notation on the original request "No

evidence of unlawful sales" (R. 84), thus pointing out that this requested instruction in its entirety was properly refused.

Finally, the general rule relating to requested instructions is that where requested instructions are refused it must be presumed that they were refused for lack of supporting evidence where, as here, the record does not contain the evidence. 5 C.J.S., Appeal and Error, Sec. 1560, pp. 1208-1209.

In summary, therefore, we are faced with a situation where this Court could not conclude that the Trial Court was in error even if all of the abstract legal principles of the petitioner were correct, which they are not. The burden is on petitioner to show prejudicial error, and this it cannot do without the evidence. Under these circumstances this Court certainly should not grant certiorari.

Thus since it is clear that the petition for a writ of certiorari should be denied because of the lack of a proper record, we will give the contentions of the petitioner only a very brief discussion.

A. *Level of Competition*

Without the facts in the record on appeal, it would be impossible for this Court to ascertain if the instructions given by the trial court on this topic were correct or not. Petitioner in its discussion under this point assumes that the parties competed only at the wholesale level. The evidence actually showed that most of the respondent's sales in the Silver City area were to dealers who in turn sold them either to contractors or at retail, the largest volume being sold to contractors, and that the competition which Atlas block had to meet were sales or bids made directly by the petitioner to contractors. Thus the factual assump-

tion of petitioner is incorrect. Moreover, the law is well established that there may be different levels in the sales of a product. See *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356, 363 (9th Cir. 1955), *cert. denied*, 350 U. S. 991, 100 L. Ed. 856, (1956); *Federal Trade Commission v. Standard Oil Company*, 355 U. S. 396, 2 L. Ed. 2d 359 (1958).

B. *Burden of Proving Harmful Effects*

The instructions complained of under this argument of petitioner merely placed the burden of proof on petitioner to prove a price discrimination within the meaning of 15 U. S. C. A., Section 13(a). Petitioner's position apparently is that if it proved a price differential, then the burden was on respondent to prove that such differential was not a price discrimination. But as said by the Court of Appeals in this case, it is not every price differential which is a discrimination. *The Elgin Corporation v. The Atlas Building Products Company*, 251 F. 2d 7, 11 (1958). A price differential certainly is not price discrimination within the prohibition of Section 13(a) unless the differential may have the proscribed effects therein set forth, and as to all of this the petitioner has the burden of proof. This Court has decided in the case of *Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 78, 97 L. Ed. 1454, 1466 (1953) that Congress did not intend to make a defendant disprove a tendency to injure competition. It is significant that the case relied upon by petitioner to support this doctrine of shifting the burden of proof, *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378 (2d Cir. 1945) was repudiated by the Federal Trade Commission because of the *Automatic Canteen* case in its *General Foods Corporation* case decided in 1954 as F. T. C. Docket 5675. Thus

the Federal Trade Commission now requires the complaining party to prove the harmful effects.

C. *Mill Net Return*

The statement by petitioner that a seller must realize the same mill net return on sales of commodities in every area served has absolutely no basis in the statute or the cases. The history of the Robinson-Patman Act is set out in a book written by William Simon, formerly general counsel of the Senate Interstate and Foreign Commerce Committee, Subcommittee on Trade Policies, entitled *Geographic Pricing Policies* (Callaghan & Co., 1950). The author points out at pages 62 and 66 that the legislative history is conclusive that the bill as passed contained no uniform mill net return requirement. In fact, if a definition of "price" which would have required a uniform mill net return had not been stricken from the bill, it never would have received a favorable vote of the Committee. This legislative history is also detailed by Mr. Chief Justice Stone in *Corn Products Refining Co. v. Federal Trade Commission,* 324 U. S. 726, 737, 89 L. Ed. 1320, 1331 (1945). The Federal Trade Commission ended its dalliance with this theory in the case of *National Lead Company,* 49 F. T. C. 791, 881 (1953). Any lingering doubts as to the applicability of this theory were put to rest by the decision in *Balian Ice Cream Co. v. Arden Farms Co.,* 231 F. 2d 356 (9th Cir. 1955), *cert. denied,* 350 U. S. 991, 100 L. Ed. 856 (1956). Finally, regardless of the necessity of a uniform mill net return, unless Atlas block were being sold to petitioner's customers or prospective customers at a lower price than petitioner was selling or offering to sell its block, then no error could have been committed in not charging that a uniform mill net return is mandatory. Thus in the absence of any evidence in the

record, no determination of error by the trial court could be made even if a uniform mill net return is required by law.

D. *Knowledge of Competitor's Price*

This Court in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 759, 89 L. Ed. 1338, 1347 (1945) made it clear that actual knowledge of a competitor's price is not required, but simply due diligence to make the most intelligent estimate of what the competitor's prices are is possible under the circumstances. In the absence of the facts in this case this Court cannot know what the evidence was on which the instruction of the court was given and on which the requested instruction of petitioner was denied, and for that reason this point is without merit.

E. *Lawfulness of the Price Met*

It is clear that there was no evidence of unlawful sales by any competitors of respondent (R. 84). In the most recent case decided in connection with instructions relating to meeting competing prices, the Court of Appeals for the Fifth Circuit ruled that where there is no evidence of unlawful prices a lower court was correct in giving an instruction without the word "lawful" and was in error in granting a new trial and giving an instruction using the word "lawful". *Standard Oil Co. v. Brown*, 238 F. 2d 54 (5th Cir. 1956).

F. *Geographic Price Discrimination*

The quick answer to this argument is that there is no showing that the evidence raised any issue or question of geographic price discrimination as discussed by petitioner under this topic. It is clear that any instructions given or refused on this topic must have had a close relation to the

evidence and absent this evidence no discussion of this point can be made. Moreover, it should be noted that Section 3 of the Robinson-Patman Act, 15 U. S. C. A. Sec. 13 a was voluntarily withdrawn from the case by petitioner at a pre-trial conference.

G. Competing Purchasers Requirement

The legislative history of the Robinson-Patman Act indicates clearly that there can be no discrimination under 15 U. S. C. A. Sec. 13(a) unless sales to competing purchasers are involved. *Congressional Record, 1936,* page 8229; *House Report 2287,* 74th Cong., Second Session. The cases have consistently ruled that competing purchasers are necessary before there can be price discrimination. See, e. g., *Balian Ice Cream Co. v. Arden Farms Co.,* 231 F. 2d 356 (9th Cir. 1955), *cert. denied,* 350 U. S. 991, 100 L. Ed. 856 (1956); *Klein v. The Lionel Corp.,* 138 F. Supp. 560 (D. Del. 1956), *affirmed,* 237 F. 2d 13 (3d Cir. 1956); *Chicago Sugar Co. v. American Sugar Refining Co.,* 176 F. 2d 1, 7 (7th Cir. 1949), *cert. denied,* 338 U. S. 948, 94 L. Ed. 584 (1950).

POINT II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT CORRECTLY REFUSED TO RULE ON CERTAIN PURPORTED OBJECTIONS TO INSTRUCTIONS.

As has been pointed out heretofore in Point I, in the absence of a record on appeal containing the evidence in a trial, an appellate court is never under any obligation to decide the question of whether certain instructions given by a trial court were correct or whether the refusal of the trial court to given certain requested instructions was correct. Actually the Court of Appeals was under no obliga-

tion to discuss any of the objections raised by petitioner to instructions given or refused. The fact that the Court consented to discuss any of these problems was a gratuity granted the petitioner by the Court. Petitioner, by choosing to take its appeal without a record, ran the very risk which actually occurred — that the Court would refuse to go into the merits of its objections.

Moreover, an examination of the instructions of the Court when compared with the objections stated by petitioner shows clearly that such objections failed to bring into focus the precise nature of the alleged error. Clearly, this case is not a situation where a Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision within the meaning of Supreme Court Rule 19 (1) (b).

POINT III. THE OPINION OF THE COURT BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS IN THE SAME MATTERS NOR IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Faced with the vacuum of a record without the evidence, petitioner is simply unable to show that the opinion of the Court of Appeals for the Tenth Circuit in any way conflicts with the decisions of this Court or of any other court. The brief summary we have made under Point I relating to the merits of the contentions of petitioner shows conclusively that far from being in conflict with decisions of this Court and other courts, the opinion of the Court of Appeals was completely consistent with such decisions. Thus petitioner's third point is without merit.

CONCLUSION

For the reasons stated above the petition for certiorari should be denied.

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